No. 18-483

IN THE

Supreme Court of the United States

COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF HEALTH, *ET AL.*, *Petitioners*,

v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., *ET AL.*, *Respondents*.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

Brief *Amicus Curiae* of Pro-Life Legal Defense Fund, Eleanor McCullen, One Nation Under God Foundation, Conservative Legal Defense and Education Fund, Pass the Salt Ministries, Liberty Fellowship, Pastor Chuck Baldwin, Fitzgerald Griffin Foundation, Policy Analysis Center, Restoring Liberty Action Committee, and Center for Morality in Support of Petitioners

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INTEREST OF THE *AMICI CURIAE*[1]

Pro-Life Legal Defense Fund, One Nation Under God Foundation, Conservative Legal Defense and Education Fund, Pass the Salt Ministries, Fitzgerald Griffin Foundation, and Policy Analysis Center are nonprofit educational, legal, and religious organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code.

Eleanor McCullen has a pro-life counseling ministry and was the lead plaintiff in McCullen v. Coakley, 134 S.Ct. 2518 (2014).

Liberty Fellowship is a non-IRC section 501(c)(3) church in Kila, Montana, whose pastor is Chuck Baldwin.

Restoring Liberty Action Committee and Center for Morality are educational organizations.

Each of these *amici* seeks, *inter alia*, to participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Indiana's "Sex Selective and Disability Abortion Ban" prohibits abortions solely motivated by the sex, race, or physical or mental disability of the baby. Circuit Court Judge Dan Manion described the members of the protected class as "especially vulnerable unborn children." Planned Parenthood of Ind. & Ky. v. Commissioner, 888 F.3d 300, 310 (7th Cir. 2018) (Manion, J., dissenting). In enacting this law, the Indiana General Assembly sought to reverse policies which had been adopted long ago in Indiana and elsewhere, authorizing the sterilization of women who had certain characteristics, so as to minimize the number of thought-to-be undesirable categories of persons, and thereby improving society. Based on a theory adopted by a relative and follower of Charles Darwin, the desire to give evolution a helping hand , by eliminating the un-fittest, was and is one of the central goals of the eugenics movement.

Standing in the way of the Indiana General Assembly, the Seventh Circuit determined that this Court's decision in Planned Parenthood of S.E. Pennsylvania v. Casey, 505 U.S. 833 (1992), controlled, allowing the lower courts no latitude to impede a woman's right to terminate her pregnancy — even if the child's life is being ended for reasons that would prevent an employer from firing someone from a job. Neither Roe v. Wade, 410 U.S. 113 (1973), nor Casey addressed the use of abortion to achieve eugenic goals. But, as Judge Manion explained, the lower courts view the right to an abortion as a "super-precedent" which has "spawn[ed] a body of jurisprudence that has made

abortion the only true 'superright' protected by the federal courts today ... the *only* [right] that may not be infringed even for the very best reason. For an unenumerated right judicially created just 45 years ago, that is astounding." Planned Parenthood of Ind. & Ky. at 312 (Manion, J. dissenting).

The Indiana General Assembly enacted its pro-life law to prevent eugenic abortion, which has been made increasingly available by the prevalence of low-cost, non-invasive fetal genetic testing. This case provides this Court with an appropriate vehicle to repudiate its own precedents which embraced eugenics in Buck v. Bell, and to a lesser degree in Skinner v. Oklahoma,. It also presents an opportunity to repudiate certain aspects of eugenics that infect both Roe and Casey. At the same time, other scientific developments have called into question some of the assumptions Justice Blackmun made in Roe regarding the state of medical knowledge as to when life begins. The unfettered right to eugenic abortion, being practiced with increasing frequency today, constitutes an important issue which should be addressed by this Court.

STATEMENT OF THE CASE

The Indiana legislature entitled its law, which is now under review, the "Sex Selective and Disability Abortion Ban." Subsections 4 and 5 of *Indiana Code* Section 16-34-4 prohibit "sex selective abortion." Subsection 6 addresses abortions solely performed because the fetus may have Down syndrome as defined in subsection 2. Subsection 7 addresses abortions solely based on "any other disability" as defined in

subsection 1, including nonlethal physical or mental disabilities, such as scoliosis. Subsection 8 addresses abortion solely based on the race, color, national origin, or ancestry of the fetus. In each case, abortions based solely on these factors are prohibited, whether performed prior to or after viability.

Violation of these prohibitions exposes the abortion doctor to disciplinary sanctions and civil liability for wrongful death. A pregnant woman who seeks a prohibited abortion is not subject to punishment. Although there is no criminal penalty in the new law imposed on the abortionist, prior Indiana law makes it a crime to knowingly and intentionally perform an abortion that is prohibited by law. *Indiana Code* Section 16-34-2-7(a).

The Indiana law was challenged by Planned Parenthood of Indiana and Kentucky, which performs both surgical and non-surgical (or medication) abortions. The U.S. District Court for the Southern District of Indiana first entered a preliminary injunction, and then granted plaintiff's motion for summary judgment, enjoining the State from enforcing the statute. The U.S. Court of Appeals for the Seventh Circuit affirmed. Planned Parenthood of Ind. & Ky. v. Commissioner of the Ind. State Dep't of Health, 888 F.3d 300 (7th Cir. 2018).[2]

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[2] Circuit Judge Manion dissented only as to a different part of the Indiana law requiring that the fetal remains be disposed of in a dignified and humane manner. *See id.* at 317-21.

ARGUMENT

This brief addresses the second issue presented in the petition for certiorari: "Whether a State may prohibit abortions motivated solely by the race, sex, or disability of the fetus and require abortion doctors to inform patients of the prohibition."

I. THE INDIANA LAW UNDER REVIEW SEEKS TO ERADICATE THE STAIN OF EUGENICS ON THE STATE OF INDIANA.

The Indiana statute's prohibited abortion categories were described by dissenting Judge Manion as protecting "especially vulnerable unborn children." Planned Parenthood of Ind. & Ky. at 310 (Manion, J., dissenting). These categories also share a common lineage, as various believers in the "science" of eugenics have sought to at least reduce the number of persons exhibiting certain traits, if not eradicate them entirely.

Eugenics has been described by the man who coined the term as "'the science which deals with all influences that improve the inborn qualities of a race; also with those that develop them to the utmost advantage.'" G.K. Chesterton, Eugenics and Other Evils at 14 (M. Perry, ed.) (Inkling Books, 2000) (quoting Francis Galton, Charles Darwin's half-cousin who has been called the father of eugenics). Although the aim of eugenics has been to improve the "qualities of a race," one of the primary means of doing so has been to reduce the numbers of those who are considered undesirable.

Proponents of eugenics supported immigration policies designed to restrict the numbers of genetically undesirable individuals and to impede reproduction by those considered undesirable.[3] Some states came on board by enacting legislation to sterilize certain people such as the mentally ill. But as Charles Darwin's grandson acknowledged, "'it is quite certain that no existing democratic government would go as far as we Eugenists think right in the direction of limiting the liberty of the subject for the sake of the racial qualities of future generations.'" Chesterton, Eugenics at 13 (quoting Leonard Darwin).

Beginning in the Progressive Era, many states promoted policies designed to improve the gene pool. Indiana was among the leaders in embracing the eugenics movement and its apparent goal to advance the perfectibility of man on earth. On April 27, 1907, Indiana enacted the first eugenics sterilization legislation in the world. One hundred years later, Indiana sought to eradicate this stain on the state in a variety of ways, including the issuance of a formal apology by the Indiana House and Senate. Senate Concurrent Resolution, 115th General Assembly (2007).[4] The Whereas clauses of that resolution recited

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[3] *See* A. Cohen, Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck at 5 (Penguin: 2016).

[4] *See* "A concurrent resolution to mark the centennial of Indiana's 1907 eugenical sterilization law and to express the regret of the Senate and House of Representatives of the 115th Indiana General Assembly for Indiana's experience with eugenics." https://www.in.gov/legislative/bills/2007/SRESP/SC0091.html.

just a few of the unpleasant facts of that era, including this Court's role:

> Whereas, Following the **U.S. Supreme Court precedent**, Indiana enacted a new sterilization law in 1927 authorizing the compulsory sterilization of persons living in a state institution;
>
> Whereas, Indiana **involuntarily sterilized some 2,500 people**, while more than 65,000 people were sterilized under similar laws in 30 other states during the same period;
>
> Whereas, Eugenics legislation **devalued the sanctity of human life**, placed claims of scientific benefit over human dignity, and **denied the inalienable rights** recognized by our Founding Fathers;
>
> Whereas, Eugenics legislation **targeted the most vulnerable** among us, including the poor and racial minorities, wrongly dehumanizing them under the authority of law and for the claimed purpose of public health and the good of the people.... [*Id.* (emphasis added).]

In that resolution's first of two Resolves, the Indiana General Assembly expressed "its regret over Indiana's role in the eugenics movement in this country and the injustices done under eugenic laws." This apology was then followed up with a call to reflection and action:

> the General Assembly urges the citizens of Indiana to become familiar with the history of

> the eugenics movement in the belief that **a more educated and enlightened population will repudiate the many laws passed in the name of eugenics and reject any such laws in the future.** [*Id.* (emphasis added).]

Now, 110 years later, as the Indiana General Assembly's most recent effort to undo the damage of eugenics, it enacted the law under review, this time designed not to eradicate, but to protect, Indiana's vulnerable minorities by prohibiting eugenics-based abortions.[5]

Supporters of abortion rights may find it distasteful to link that judicially sanctioned practice with eugenics, but the tie cannot be ignored, and is being increasingly revealed. Just last year, *The Atlantic* collected comments from readers under the heading "When Does Abortion Become Eugenics?"[6] Among the most startling comments was the fact that China and India "eliminate more girls [every year] than the number of girls born in America every year." It also included this further provocative statement:

> [T]he pro-life camp [has] demonstrated that it is logically impossible to be both "pro-choice"

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[5] *See* Indiana Eugenics, History & Legacy, 1907-2007, http://www.iupui.edu/~eugenics/.

[6] *See* "When Does Abortion Become Eugenics?" *The Atlantic* (2016) https://www.theatlantic.com/notes/all/2016/05/when-does-an-abortion-become-eugenics/483659/.

> and "anti-discrimination." Why is this the case? Because "choice" and "discrimination" are the same thing.

Stated another way, an unlimited right to choose allows that choice be exercised in a manner that is discriminatory. The documentary movie "It's a Girl" exposes the widespread practice of sex-selective abortion — and infanticide — in China and India, euphemistically called "gendercide." In an article about that movie, it is stated that "ultrasound and abortion has increased the ease of gendercide for wealthier people, and so has created unprecedented gender imbalances (140 boys to 100 girls, according to the film)."[7]

It is no coincidence that the plaintiff in this case is a component of the vast network of Planned Parenthood abortion providers, which trace their pedigree and largely owe their existence to their co-founder, Margaret Sanger. Sanger was not shy about her devotion to eugenics:

> As an advocate of Birth Control, I wish to take advantage of the present opportunity to point out that the **unbalance between the birth rate of the "unfit" and the "fit"**, admittedly the greatest present **menace to civilization**,

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[7] N. Berlatsky, "Neither Pro-Life Nor Pro-Choice Can Solve the Selective Abortion Crisis," *The Atlantic* (Mar. 6, 2013). https://www.theatlantic.com/sexes/archive/2013/03/neither-pro-life-nor-pro-choice-can-solve-the-selective-abortion-crisis/273704/.

> can never be rectified by the inauguration of a cradle competition between these two classes. In this matter, the example of the **inferior** classes, the fertility of the feeble-minded, the mentally defective, the **poverty-stricken** classes, should not be held up for emulation to the mentally and physically fit though less fertile parents of the educated and well-to-do classes. On the contrary, **the most urgent problem today is how to limit and discourage the over-fertility of the mentally and physically defective.** [Margaret Sanger, "The Eugenic Value of Birth Control Propaganda,"[8] *Birth Control Review* (Oct. 1921) at 5 (emphasis added).]

In another remarkable paragraph from that 1921 article, Sanger saw birth control as not the only solution to the problem of what she viewed as irresponsible breeding, but anticipated that governments someday may need to resort to force to defend against this perceived threat to mankind. One can only imagine what she had in mind in penning these words:

> Birth Control is not advanced as a panacea by which past and present **evils of dysgenic breeding** can be magically eliminated.

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[8] *See* https://www.nyu.edu/projects/sanger/webedition/app/documents/show.php?_sangerDoc=238946.xml.

> Possibly **drastic and Spartan methods**[9] **may be forced** upon society if it continues complacently to encourage the **chance and chaotic breeding** that has resulted from our **stupidly cruel sentimentalism**. [*Id.* (emphasis added).]

The Seventh Circuit's decision viewed the constitutionality of abortion eugenics in simple terms. The Court read Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), to have established a "categorical" and "unambiguous" right of every woman to terminate her pregnancy before viability. Planned Parenthood of Ind. & Ky. at 305. Although Casey did not address the issue of genetic abortion, the Seventh Circuit read it as establishing a right not only to terminate a pregnancy (and a baby), but also to do so for any reason whatsoever.[10]

Likewise, in dissent, Judge Manion agreed that the genetic abortion ban constituted a "substantial obstacle" to seeking abortion, and thus was not

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[9] Certainly, "drastic and Spartan methods" were later used in Germany. *See* T. Murphy & M. Lappe, Justice and the Human Genome Project (U. Cal Press: 1994) ("The most powerful union of eugenic research and public policy occurred in Nazi Germany. Much of eugenic research in Germany before and even during the Nazi period was similar to that in the United States and Britain....")

[10] For the same reason, the Seventh Circuit struck down the statutory requirement that women be advised of the non-discrimination limits on abortion prior to the procedure. Planned Parenthood of Ind. & Ky. at 307.

permissible under Casey. Planned Parenthood of Ind. & Ky. at 310 (Manion, J., dissenting). But he contended there remained "two major flaws" in the Casey analysis.

> First, *Casey* treats abortion as a super-right, more sacrosanct even than the enumerated rights in the Bill of Rights.[11] And second, while *Casey* jettisoned *Roe*'s strict-scrutiny test for all first-trimester abortion regulation, it replaced strict scrutiny with an effects-based test that is actually *more difficult to* satisfy in many cases. [*Id.* at 311.]

Combined, these two "flaws" were enough to defeat Indiana's compelling interest to prevent the targeting of "protected classes" by "private eugenics" when weighed against the constitutionally unknown, judicially manufactured "super-right" to abortion.

II. THIS CASE GIVES THIS COURT AN OPPORTUNITY TO REJECT ITS DEEPLY FLAWED DEFENSE OF POLICIES GROUNDED IN EUGENICS.

The Petition for Certiorari refers to the Indiana statute as an anti-eugenics law, but did not explain why that description is judicially significant. The Indiana General Assembly's apology for its record of eugenics contained a reference to Buck v. Bell, 274

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[11] Justice Thomas made this same point in his dissent from the denial of a petition for certiorari in Silvester v. Becerra, 583 U.S. ___ (2018).

U.S. 200 (1927). In a remarkably short opinion, Justice Oliver Wendell Holmes, Jr. put this Court on record on the side of the "science"[12] of eugenics. Laying aside the issue of the likely fabrication of the facts of the case,[13] the Supreme Court affirmed the constitutionality of the forced sterilization of a supposedly feeble-minded woman. Justice Holmes elevated "the State" over the individual, expressing his disdain for the "lower classes":

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon **those who already sap the strength of the State** for these lesser sacrifices, often not felt to be such by those concerned, in order to **prevent our being swamped with incompetence**. [Buck at 207 (emphasis added).]

Then, calling upon his considerable skill to turn a phrase, he added yet another ringing justification for sterilization:

> It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their

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[12] The Court then, as well as the Court now, has been warned about deferring to bogus science: "O Timothy, keep that which is committed to thy trust, avoiding profane and vain babblings, and oppositions of science falsely so called...." 1 Timothy 6:20 (KJV).

[13] *See* A. Cohen, Imbeciles, at 24-25, 296.

> imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson* v. *Massachusetts*, 197 U.S. 11. Three generations of imbeciles are enough. [*Id.*]

Here is revealed that one goal of eugenics is to justify the prevention of a birth: to prevent crime, avoid starvation, and improve the society and the world.

The weak may be sacrificed for the common good. Yet all of these reasons that undergird eugenics policies have now been rejected broadly by Americans.[14] While it is true that, in Skinner v. Oklahoma, 316 U.S. 535 (1942), this Court imposed an equal protection limitation on the power of states to classify crimes for which sterilization is allowed, that decision allowed the practice of forced sterilization to continue.[15] Neither Skinner nor Buck has ever been overruled, but both deserve to be tossed into the "dustbin of history." Granting certiorari in this case

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[14] The state legislatures of Indiana, Virginia, Oregon, North Carolina, and California have publicly repudiated their involvement in the eugenics movement. *See* Indiana General Assembly Concurrent Resolution, *supra*.

[15] "Precisely because *Buck* was not overruled in *Skinner*, sterilization continued in asylums and welfare offices in America long after the case was decided...." V. Nourse, In Reckless Hands: *Skinner v. Oklahoma* and the Near Triumph of American Eugenics at 158 (W.W. Norton 2008).

would give this Court the opportunity to take that important step.[16]

Although not often regarded in the same category as Buck v. Bell and Skinner v. Oklahoma, this Court's abortion jurisprudence shares certain characteristics with those cases.

Forced sterilization is certainly distinguishable from unrestricted abortion. Forced sterilizations are carried out by the state against individuals targeted by the state. Abortions are carried out by abortionists who may or may not be paid by the state, and it is the mother, not the state, who decides which babies live and which die.[17] However, there is little question that abortion was adopted by eugenicists to provide a backup method to improve the gene pool, if birth control did not prevent the pregnancy. The introductory paragraphs of Justice Blackmun's opinion

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[16] To keep faith with the American people, it is important that Courts admit mistakes when recognized. Buck v. Bell has stood for 91 years, but is indefensible and should be overruled. To paraphrase Justice Holmes, "Nine decades of eugenics is enough." It took this court 74 years to correct the record on Korematsu v. United States, 323 U.S. 214 (1944), which was finally repudiated earlier this year, but for reasons unknown does not appear to have been technically "overruled." Trump v. Hawaii, 585 U.S. ___, 138 S.Ct. 2392, 2423 (2018).

[17] This difference was set out: "If indeed the woman's interest in deciding whether to bear and beget a child had not been recognized as in *Roe*, the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or **eugenics**, for example." Casey at 859 (emphasis added).

in Roe v. Wade, 410 U.S. 113 (1973) invoked the eugenic specter of "population growth, pollution, poverty, and racial overtones" which he said "tend to complicate and not to simplify the problem." Roe at 116. Equally disturbing was Justice Blackmun's review of the history of abortion, tracing it back to pagan cultures, as though those societies were worthy of emulation. *Id.* at 129.

Additionally, Justice Blackmun repeatedly cited Margaret Sanger biographer Lawrence Lader's 1966 book Abortion to support his arguments. Lader's later work "Breeding Ourselves to Death," (1971) addresses many of the assumptions of the eugenics movement. And he repeatedly cited Glanville Williams, a Fellow of the British Eugenics society, and his book The Sanctity of Life and the Criminal Law. One of the sentences from the book on which Justice Blackmun relied, but did not quote, constituted a ringing endorsement of eugenics:

> There is, in addition, the problem of eugenic quality. We now have a large body of evidence that, since industrialization, the **upper stratum of society** fails to replace itself, while the population as a whole is increased by excess births among the **lower and uneducated classes**. [Glanville Williams, The Sanctity of Life and the Criminal Law, (emphasis added) quoted in P. Mosley, "Why

the Hysteria Over *Roe*? Because it Would Strike a Blow to Eugenics (July 6, 2018).[18]]

III. IN THE 45 YEARS SINCE ROE, SCIENCE HAS ADVANCED TO ESTABLISH THE PERSONHOOD OF AN EMBRYO.

Justice Blackmun in Roe v. Wade made several observations as to the state of medical knowledge as it existed in 1973. *See, e.g.,* Roe v. Wade at 116 ("advancing medical knowledge and techniques"); 149 ("Modern medical techniques"); 159 ("at this point in the development of man's knowledge"). Such observations give rise to the inference that, as medical knowledge advances, the Court's decision would need to be re-examined — and would be re-examined as needed. This is such a case. This *amicus* brief reports on just three recent scientific developments.

First, in the last decade, a scientific development has come to the fore which challenges Justice Blackmun's theories about viability, physical development, and stages of pregnancy — known as Contact Embryoscopy. This scientific breakthrough allows physicians to visualize a fetus through the cervix beginning at the gestational age of 8 to 12 weeks — within the first trimester.[19] This new technology even has led to the development of free apps which

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[18] *See* http://www.frcblog.com/2018/07/why-hysteria-over-emroeem-because-it- would-strike-blow-eugenics/.

[19] *See* https://www.researchgate.net/publication/22418753_Contact_embryoscopy.

allow parents to track the growth of their baby in utero on their cell phones or tablets — seeing pictures and videos which reflects each stage of their baby's development — beating hearts, developing eyes, emerging fingers, changing facial expressions, and much more.[20] Contact Embryoscopy has eviscerated the oft-repeated "blob of tissue" justification for abortion.

Second, in 2011, a remarkably detailed and scientifically based study by two professors was published, entitled Embryo: A Defense of Human Life. This book did not focus on religious or moral issues, but rather cataloged available scientific data detailing every stage of the development, from the moment of formation of a single zygote cell onward — whether termed an embryo, or later a fetus. Based on that extensive analysis, this book drew three conclusions — that an embryo is: (i) distinct from parents; (ii) genetically human; and (iii) complete — ergo, a human being.

> First, the embryo is from the start **distinct** from any cell of the mother or the father.... Second, the embryo is **human**; she has the genetic makeup characteristic of human beings. Third, and most important, the embryo is a **complete** or whole organism, though immature. The human embryo, from conception onward, is fully programmed and

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[20] *See* The Endowment for Human Development's "See Baby Pregnancy Guide," which is described as "Changing the way people see pregnancy." And indeed, it has.

> has the active disposition to use that information to develop herself to the mature stage of a human being.... None of the changes that occur to the embryo after fertilization, for as long as she survives, generates a new direction of growth.... A human embryo is not something different in kind from a human being. [Robert P. George and Christopher Tollefsen, Embryo: A Defense of Human Life, (Witherspoon Institute, 2nd ed. 2011) at 49-50 (emphasis added).]

These two professors concluded that, just as post-natal human beings progress through stages of life, the "embryonic, fetal, child, and adolescent stages are *just that* — stages in the development of a determinate and enduring entity — a human being — who comes into existence in a single-celled organism (a zygote) and develops, if all goes well, into adulthood many years later." *Id.* at 50.

Third, at the same time that science is revealing that an embryo is just another stage in the continuum of human development, genetics is placing a "decision point" in the hands of parents where no decision point ever previously existed. The Seventh Circuit explained that Indiana's "non-discrimination provisions were prompted by the medical advances of non-invasive genetic testing which allow for the detection of disabilities at an early stage in the pregnancy." Planned Parenthood of Ind. & Ky. at 303. The ease and speed with which science can identify genetic conditions of unborn children is improving at

an astonishing pace.[21] And it is this wealth of available genetic information about a baby which provides the impetus for some parents to consider abortion as an option, where otherwise it would never have been considered. Stated another way, where previously there would have been no thought even given to making a pregnancy-ending decision, parents are now asked to make a decision — which is very different from the decision addressed in Roe and Casey.

Today, abortions can be had not because the mother does not want to have a child — but because the mother does not want *that kind* of child. As Judge Easterbrook put it:

> there is a difference between "I don't want a child" and "I want a child, but only a male" or "I want only children whose genes predict success in life." Using **abortion to promote eugenic goals** is morally and prudentially debatable on grounds **different from** those that underlay **the statutes *Casey* considered**. [Planned Parenthood of Ind. & Ky. v. Comm'r of the Ind. State Dep't of Health, 2018 U.S. App. LEXIS 17676 at *11-*12 (2018) (Easterbrook, J., dissenting from

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[21] Such non-invasive prenatal DNA testing is widely advertised, sometimes costing under $1,000. One common test examines fetal cells found in a maternal blood sample drawn anytime after the 10th week of gestation, and swabs from the father. *See, e.g.*, http://www.prenatalgeneticscenter.com/services/prenatal-dna-paternity-test/.

denial of rehearing *en banc*) (emphasis added).]

Indeed, these scientific developments raise questions not previously considered, or decided, by this Court. Whether there should exist what Judge Easterbrook called "a parallel 'except' clause" for eugenics-motivated abortion occurring with increasing frequency constitutes an "important question of federal law that has not been, but should be, settled by this Court...." Supreme Court Rule 10(c).

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be granted and the second issue presented should be decided by this Court.

Respectfully submitted,

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